FILED
FEB 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1456

IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The question in this case is whether the act of hiding illicit proceeds while transporting them internationally – without more – violates 18 U.S.C. § 1956(a)(2). The Government clearly wants the answer to that question to be yes, but it cannot identify any coherent interpretation of the statute to produce that result. Its overly-expansive view of the statute is internally contradictory, inconsistent with the statute's text, and contrary to its fundamental objectives.

Properly understood, § 1956(a)(2) criminalizes the act of transporting illicit funds for the purpose of concealing or disguising *certain attributes* of those funds – attributes which, if known, would help expose the funds' criminal taint. The statute does *not* prohibit the more general act of concealing the funds themselves during transport, as the Government insists. Indeed, the Government *wanted* to prohibit this general conduct when § 1956(a)(2) was originally proposed, but Congress explicitly rejected that proposal in favor of the statute as written. The Government now seeks to resurrect its defeated proposal by rewriting the statute in favor of a general prohibition on concealing or disguising the illicit funds themselves. That is not what the statute says, and it is not what Congress intended.

Petitioner's reading, by contrast, reconciles the statute's text, structure, and purpose. And it does so without requiring any revisions of the statutory text, contrary to the Government's contention. The requirement that a transaction or transportation be

designed to create the appearance of legitimate wealth merely encapsulates the meaning and effect of the particular *attributes* that must be concealed. Exposing those attributes reveals the funds' connection to criminals or to criminal activity; likewise, concealing those attributes tends to make the funds "appear legitimate" by obscuring any obvious connection to criminals or to criminal activity.

Because the evidence here shows only that petitioner physically hid illicit bulk cash in his car during transit – and not that he knew of some further design to conceal attributes of the cash that would expose its illegitimacy – his conviction must be reversed.

ARGUMENT

I. SECTION 1956(a)(2) DOES NOT CRIMINALIZE THE PHYSICAL CONCEALMENT OF ILLICIT PROCEEDS DURING INTERNATIONAL TRANSPORTATION

A. The Government's Construction Of § 1956(a)(2) Is Incoherent

According to the Government, the mere act of transporting illicit funds out of the country constitutes criminal money laundering under the statute's plain text. This construction of § 1956(a)(2) is as wrong as it is brazen.

The Government's theory starts from the premise that § 1956 was enacted because "law enforcement needed better tools to find and seize illegal proceeds *no matter how* criminals sought to conceal or disguise them." U.S. Br. 30. Congress accordingly

sought broadly to criminalize *all* "efforts to disguise or conceal illegitimate funds." *Id.* at 24.

Consistent with that supposed objective, a prohibited "concealment" under the statute as the Government construes it is any transaction or transportation designed to "make detection" of the *funds themselves* "less likely." *Id.* at 16; *see id.* at 12 (statute prohibits transportation of illegal proceeds "knowing of the design of the transportation to hide the funds themselves, their illegal origins, their ownership, and their control"); *id.* at 17 (to violate the statute, a person need only knowingly "'conceal' the location or existence of the funds"); *id.* at 37 (money laundering charge is appropriate where "transportation was designed to conceal or disguise the funds"). And because the "very act of getting the funds out of the country significantly reduces the chance that substantial quantities of unexplained cash that would betray the criminal nature of an enterprise will be detected," the mere act of transporting illicit funds internationally violates the statute. *Id.* at 21; *see id.* at 15 ("An equally effective way to 'disguise' illegitimate funds is to get them out of the country altogether, in which case they will not betray the illicit nature of an unlawful enterprise.").[1]

That reading of the statute is unsustainable. Indeed, even the Government does not have the courage of its own construction. After strenuously insist-

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[1] With respect to petitioner's conviction specifically, the Government argues that his conviction should stand because "the transportation was designed to 'conceal' the 'location' and the 'nature' of the funds by moving them to Mexico without detection by law enforcement." *Id.* at 43.

ing that § 1956(a)(2) criminalizes international transportations that make detection and recovery of illicit funds more difficult – which is to say *all* international transportations – the Government immediately introduces qualifiers that are inconsistent with its own reading of the text, thereby demonstrating the fundamental inadequacy of that reading.

1. If simply transporting illicit proceeds across the border were sufficient under the statute, the entire "designed to conceal" element would be superfluous. *See FCC v. NextWave Pers. Comm'ns, Inc.*, 537 U.S. 293, 302 (2003) (interpretation rendering language superfluous "must be rejected"). The "anti-surplusage canon" (U.S. Br. 17 n.2) is especially important where, as here, the provision effectively being read out of the statute "occupies so pivotal a place in the statutory scheme." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). If the Government's interpretation of the "design to conceal" element were correct, that detailed requirement would have "no operative effect" on the international transportation prong of § 1956(a) – the statute would be satisfied by international transportation itself. At a minimum, the Government's construction would render the five listed attributes meaningless – the statute would simply criminalize cross-border transportations "designed . . . to conceal . . . the proceeds of unlawful activity." 18 U.S.C. § 1956(a)(2)(B)(i). A statute written that way would have been consistent with the Government's position; the statute Congress actually wrote is not.

Plainly, had Congress intended to capture the mere hiding of the proceeds themselves, it could have done so easily. As petitioner has noted (Petr.

Br. 32-33), the Bulk Cash Smuggling ("BCS") statute – unlike § 1956 – criminalizes the act of concealing the money itself, rather than a precisely-drawn list of certain attributes of that money. *See* 31 U.S.C. § 5332(a)(1) (statute targets anyone who "conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container"). Similarly, it would have been enough for Congress to say – as the Government originally wanted Congress to say – that the mere act of transporting illicit proceeds internationally is criminal money laundering. But Congress instead chose to address only those international transportations whose *purpose* is to conceal five telltale traits that betray the illegitimate nature of the proceeds. Petr. Br. 40; *see infra* at 17-19.

2. Tacitly acknowledging the implausibility of its broad reading of the concealment element, the Government introduces qualifiers that undermine its reading. To start, the Government occasionally seems to concede that funds at least must be physically hidden during cross-border transport to constitute "concealment." *See* U.S. Br. 38 ("surreptitious cross-border transportation (*i.e.*, smuggling) of illegal proceeds"); *id.* at 24 ("making the funds disappear by secreting them out of the jurisdiction works well" to "conceal illegitimate funds"); *id.* at 47 n.20 (hiding cash in shoe while crossing border). But if simply moving the funds to another country is concealment because it reduces the chance they will expose the illegitimacy of an unlawful enterprise, then the requirement of physical hiding would be superfluous – the prohibited "design to conceal" would be ade-

quately inferred from the act of moving the money offshore. The Government's insertion of a physical hiding qualifier is a tacit acknowledgment that "concealment" must require something more than a simple effort to make illicit funds more difficult to find and recover.

Indeed, the Government ultimately goes further, acknowledging that not even the physical hiding of illicit funds during transport can be enough to establish an unlawful concealment. The Government concedes that because all travelers normally keep money out of sight, "a degree of disguising or concealment is inherent" in every "transportation of money." U.S. Br. 42. Thus, says the Government, § 1956(a)(2) is implicated only where "an individual transports illegal currency in a way that . . . differ[s] from how currency ordinarily is transported – such as in a wallet or purse or pocket." *Id.* at 41. Put differently, "concealment measures undertaken during the transportation" must be "sufficiently unusual and probative" before a prohibited concealment will exist. *Id.* at 42 n.16. This "unusual measures" qualifier has no basis in the statute's text – the Government adds it only to make its construction seem plausible.

But it does not even serve that end: the "unusual measures" qualifier is, in practice, no qualifier at all. No "wallet or purse or pocket" yet devised is large enough to contain the type of illicit bulk cash involved in transportation money laundering. Further, no person carrying bulk cash – especially *illicit* bulk cash – would just stuff it in his pocket; like anyone carrying large amounts of money abroad, a person carrying illicit cash across the border will *al-*

ways take extra measures to hide it from prying eyes, whether it be in a locked case, a car trunk, or a hidden compartment.[2] In other words, the Government's reading, even as qualified by the "unusual measures" test, would again effectively criminalize *every* international transportation of illicit proceeds.[3] The Government essentially concedes as much by agreeing that a pickpocket who hides the cash in his shoe while crossing the border violates the statute. U.S. Br. 47 n.20.

Finally, the Government's reading of the statute depends upon an unnatural interpretation of the term "design" – one that contradicts even the definitions offered by the Government. Each of those definitions refers to a mental state, as in "to conceive

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[2] It bears noting that even for smaller sums of money, the Government's proposed rule is contrary to widely accepted and government-recommended travel practices. The Department of State specifically advises against carrying money in this supposedly "ordinary" fashion when traveling internationally. *See A Safe Trip Abroad*, http://travel.state.gov/travel/tips/safety/safety_1747.html (last visited Feb. 15, 2008) (recommending that travelers carrying cash should "[a]void handbags, fanny packs and outside pockets that are easy targets for thieves. . . . One of the safest places to carry valuables is in a pouch or money belt worn under your clothing.").

[3] The Government's attempt to distinguish *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), only further demonstrates the weakness of its interpretation. The Government asserts that *Dimeck* did not involve "elaborate measures designed to conceal the location and nature of illegal proceeds from law enforcement." U.S. Br. 45 n.19. But the proceeds in *Dimeck* were concealed in a box – not in a "wallet or purse or pocket" – and thus would appear to satisfy the Government's "unusual measures" test.

and plan out in the mind." U.S. Br. 14 (also defining "design" as "[t]o plan mentally" or "to conceive or fashion in the mind; invent") (citations omitted); Petr. Br. 40 (same). In its brief at the *certiorari* stage, the Government accepted the plain import of those definitions, and agreed that § 1956(a) "makes it an offense to transport money *for the purpose of* concealing or disguising it." Br. Opp. 11 (emphasis added). The Government's reading of the statute now depends on a very different construction of the word "design" – i.e., as pertaining to the physical or structural design of the method of transportation. *See* U.S. Br. 21 ("Congress focused on how the transportation itself was 'designed'"); *cf.* Petr. Br. 39-40. On that view, so long as the transportation method was set up in such a way as to physically hide the proceeds, the transportation has been "designed" to "conceal," and the *purpose* of the transportation becomes wholly irrelevant. Yet again, the Government's reading of the statute cannot be reconciled with its own reading of the statute.

3. In the end, the Government's own summary of its proposed rule aptly captures its flaws: "When the circumstances surrounding a transaction or transportation do not demonstrate it was designed to conceal or disguise *in the relevant sense*, a money laundering conviction will not be supported by the evidence." U.S. Br. 33 (emphasis added). The Government cannot and does not explain, in any coherent or principled fashion, what constitutes a transportation designed to conceal "in the relevant sense." Is it the mere act of transporting illicit funds abroad where they are hard to detect and recover? Is it transporting them in a way that keeps them hidden? Is it tak-

ing extra-special measures, not usually taken by those carrying bulk money abroad, to keep the funds hidden? What measures are special enough? A box? A locked box? A locked box locked in the trunk? The meaning of concealment "in the relevant sense" is a concept known only to the Government – it provides no notice whatsoever to persons who may be subject to the statute, and no guidance to the courts, prosecutors, and juries who must apply it.

The Government does suggest one construction of the statute that makes sense: a violation is shown where "independent evidence establishes that concealment or disguising of a pertinent attribute of the proceeds would occur at the point of destination." U.S. Br. 41. Significantly, it is the only construction the Government proposes that derives from the statute's actual language – specifically, the transportation must have the purpose ("design") of concealing or disguising a "pertinent attribute of the proceeds." This can be the only "relevant sense" of concealment: there must be evidence establishing that the purpose of the transportation was to cleanse the proceeds by concealing one or more of the attributes that expose their illegitimacy, and that the defendant knew of that purpose. Merely transporting illicit funds internationally, or merely hiding them during such transportation, says nothing at all about the purpose of the transportation, much less establishes that the transportation was intended to conceal an attribute of the funds that would expose their illegitimacy.

B. The Statute Requires That Illicit Proceeds Be Transported For The Purpose Of Cleansing Them By Concealing A Listed Attribute

Contrary to the Government's submission, reading the statute to require proof that the purpose of the transportation was to cleanse illicit funds of their taint of criminality by concealing a listed attribute is the only construction that makes sense of the statute's text and structure.

1. *The Text Of § 1956(a) Requires That The Defendant Engaged In Conduct For The Purpose Of Creating The Appearance Of Legitimate Wealth*

The Government's principal objection to petitioner's reading of the text is that the words "appearance of legitimate wealth" "appear nowhere in the statute's text." U.S. Br. 9; *see id.* at 10, 12. That is true but irrelevant. Petitioner does not argue that "creating the appearance of legitimate wealth" is a *separate element* of a money laundering violation. Rather, that phrase simply encapsulates the five attributes listed in the statute, describing in a phrase the type of concealment the statute captures by its specification of those attributes. As Congress correctly perceived, it is those five characteristics, alone or in combination, that betray the illegitimate nature of the proceeds. In short, the appearance of legitimate wealth is not an additional element of proof, but rather directly reflects the concealment element as written.

The Government disputes that the listed attributes of illicit proceeds would reveal their illegiti-

macy, and contends that only concealment of the proceeds' "nature" accomplishes this result. U.S. Br. 16. These arguments are flawed. For example, the Government asserts that "[m]erely revealing the 'location' of funds in a bank account, a safe deposit box, or in the Cayman Islands, for instance, need not also reveal that the funds are criminally derived." *Id.* at 15-16. The Government is incorrect. If – as the statute contemplates – that "location" has been actively concealed as part of a scheme to cleanse dirty money by, for instance, the use of false names or a complex series of transactions, then the true location would contribute to the discovery of the funds' illegitimacy. For example, the location of funds in an offshore account might have been obscured through a convoluted transactional history that made the funds impossible to trace. If authorities were to uncover the location of the funds in the offshore account, in the name of the money launderer, then the location would, at least in part, betray the illegitimacy of the funds.

Similarly, the Government argues that "revealing the 'ownership' or 'control' of funds need not expose their illegitimacy" because "[i]ndividuals engaged in crime can have legally-derived assets also." *Id.* at 16. That is obviously true, but only because those assets are not illegitimate in the first place, and thus there is nothing to reveal. But when a criminal conceals the ownership or control of his *illicit* proceeds, revelation of those attributes would plainly reveal their illegitimacy by exposing the connection between the criminal and the funds. Nor is it true that revealing the "source" of the proceeds "would not necessarily reveal their illegal character." *See id.*

The "source" of illicit proceeds can only be the illicit activities from which they are derived, or persons involved in those activities, and thus would reveal the illegitimacy of the proceeds. In short, the Government's brief does nothing to refute the conclusion that Congress selected the attributes it did because these are the characteristics of illicit proceeds that betray their illegitimacy.

The Government's contrary conclusion rests on an unduly narrow conception of the phrase "appearance of legitimate wealth." The Government misunderstands this phrase to require that relevant concealment activities *affirmatively* indicate the legitimacy of the funds – i.e., effectively advertise to the outside world that the proceeds derive from lawful salary, investment returns, or some other form of "legitimate wealth." But the same result can be achieved by *obscuring the illegitimacy* of the proceeds, so they appear simply to be money of some kind, from some source, with no obvious connection to crime or criminals. Removing the taint of criminality is enough to permit their return to the stream of commerce without notice and without being easily traceable to illegal activity. Court of appeal decisions have recognized that the phrase "appearance of legitimate wealth" encompasses both the positive and the negative methods of reaching the same end. *See, e.g., Dimeck*, 24 F.3d at 1247 ("The money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises."); *United States v. Majors*, 196 F.3d 1206, 1212 n.12 (11th Cir. 1999) ("The activity that Section

1956(a)(1)(B)(i) seeks to prevent is the injection of illegal proceeds into the stream of commerce while obfuscating their source.").

Thus, the "drug kingpin who transfers illegal proceeds to the account of his confederate to obscure his role in the crime" (U.S. Br. 16) has indeed engaged in the relevant concealment. Although he has not created the impression that the money derived from a legitimate business enterprise, his actions have removed the taint of criminality from the proceeds by disguising their true source, ownership, and/or control. Each method, no less than the other, creates the appearance that the funds are legitimate. This is so even if the laundering activities "create[] the appearance of having no wealth at all" (*id.* at 17), because the focus is on the appearance of the proceeds themselves, not the apparent wealth of the launderer.

For these reasons, there is no force to the Government's repeated refrain that "[t]he statute does not limit the 'concealment or disguise' element to any one means or method." U.S. Br. 9; *see id.* at 10-11, 15, 20, 21-22, 24, 30. The Government contends that making illicit funds "appear to be legitimate" is a "classic way" of concealing the illegitimacy of funds, but "it is not the only way." *Id.* at 15. This contention confuses the means with the goal. Creating the appearance of legitimate wealth is not one *method* of accomplishing the "object of money laundering" (*id.*), it is the *object itself*.

2. *Petitioner's Reading Is Consistent With The Statute's Overall Structure*

Petitioner's interpretation of the statute is not only compelled by its text, but it also flows logically and necessarily from the overall structure of the statute. As petitioner has shown, "conceal" must mean the same thing in both the transaction and the transportation prongs of the statute. And because a transaction cannot physically hide proceeds, transportation concealment cannot be susceptible of that construction either. Petr. Br. 20-25.

The Government disagrees with both halves of the equation. First, the Government asserts that the "use of a safe deposit box" is a transaction that *can* physically hide money or property. U.S. Br. 18-19. That analogy is flawed. Simply placing illicit funds in a safe deposit box, without more, is not concealment. Were it otherwise, the transaction itself – the "use of a safe deposit box" – would also establish the design to conceal, stripping that element of independent meaning. To constitute concealment, the safe deposit box usage must be accompanied by *additional* concealment activity, such as opening the box under a false name, using another's box, moving the funds between multiple boxes, or otherwise obscuring the illegitimacy, not the existence, of the box's contents. Unsurprisingly, cases on this point – including those the Government cites – involve such additional acts of concealment. *See United States v. Stephenson*, 183 F.3d 110, 120 (2d Cir. 1999) (defendant placed drug money in safe deposit box in his wife's name); *United States v. Bowman*, 235 F.3d 1113, 1116 (8th Cir. 2000) (defendant concealed ownership and nature of robbery proceeds by open-

ing and frequently visiting numerous safe deposit boxes following the robberies, "shift[ing]" proceeds "into and out of various other boxes," and "moving the proceeds around so as to make tracking the money difficult"); *United States v. Short*, 181 F.3d 620, 626 (5th Cir. 1999) (defendant asked wife to place drug proceeds in safe deposit box in the name of one of her relatives); *Kiley v. United States*, 260 F. Supp. 2d 248, 272 (D. Mass. 2003) (defendant passed cash through safe deposit box opened by brother into accounts and then investments in brother's name, "allow[ing] [defendant] to invest robbery proceeds without revealing ownership and control of the funds").[4]

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[4] The Government's further efforts to show that "transactions . . . can be designed to conceal attributes of illegal proceeds without making the launderer's wealth appear legitimate" are also off-base. U.S. Br. 19. The Government argues that someone who "transfers illegal proceeds to his offshore account has concealed the location of the proceeds but has created no appearance that they were earned legitimately." *Id.* But the transfer of money to an offshore account only *moves* the funds, satisfying the international transfer element of the statute. It does not conceal their location or any other attribute absent independent evidence of concealment such as opening the account under a fictitious name. Merely depositing money in an offshore account in a transparent and easily traceable fashion is not money laundering, and none of the Government's cases suggests otherwise. *See United States v. Cihak*, 137 F.3d 252, 262 (5th Cir. 1998) (shortly after a co-defendant's conviction, the defendant hastily transferred funds through two domestic banks and then to accounts in Panama and Mexico); *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001) (defendants passed on large sums of money from drug kingpin to his arrested employees and their families, where kingpin had taken numerous other steps to distance himself from those employees).

Second, the Government contends that even if the transaction prong requires more than physical concealment, the same result does not follow for the transportation prong. *See* U.S. Br. 20. According to the Government's logic, the "context of a phrase matters," and "[b]ecause of its essentially spatial nature, a 'transportation' of funds is more likely to be designed to conceal, at a minimum, the 'location' of illegal proceeds and may less often be designed to conceal the 'nature' or 'source' of the proceeds." *Id.* at 20. Of course context matters, and had Congress given some indication in the transportation prong that it meant the concealment element to encompass the mere physical hiding of funds, then there might be some support for the Government's position. But there is *no* evidence for that proposition, and as discussed in Part I.A. above, it makes no sense. That Congress chose the same phrase in both the transaction and transportation prongs eliminates any possibility that it meant to capture two different kinds of concealment.

In the end, the Government is left to complain that petitioner's reading should not be adopted because prosecutors would find it harder to win convic-

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It is likewise incorrect that a bank account physically hides proceeds "and thus can 'conceal' attributes of funds without also disguising the funds as 'legitimate wealth.'" U.S. Br. 19-20. A bank account used in a routine fashion cannot hide proceeds because bank records would readily disclose their location. And once again, the transaction – i.e., the deposit of funds into the account – cannot also serve to satisfy the concealment element. Evidence of additional concealment efforts, like using a fictitious name to conceal the ownership of the funds, is required.

tions in international transportation money laundering cases. *Id.* at 21. No canon of construction directs courts to interpret ambiguous criminal statutes to make convictions easier to obtain. The rule is just the opposite. *See infra* Part I.E. In any event, many if not most of the same cases could be brought under the BCS statute. That the Government will have to be more selective in deciding which cases to prosecute as money laundering and which to prosecute as bulk cash smuggling is no reason to reject the only interpretation of § 1956(a) that is consistent with its terms.

C. Petitioner's Reading Of § 1956 Is Confirmed By The Legislative History

The Court need not resort to legislative history to divine the clear meaning of § 1956(a)(2). But to the extent it is relevant, the legislative history refutes the Government's position.

1. In advocating its expansive view of the money laundering statute, the Executive Branch is now asking this Court to grant what the Legislative Branch denied: a statute defining essentially any movement of unlawful proceeds as "money laundering." As discussed in petitioner's opening brief (at 29-31), every initial proposal would have defined money laundering to include any transaction involving unlawful funds. Yet Congress – while simultaneously broadening the statute to reach the act of moving money internationally – *narrowed* the statute to reach only transactions or international transportations undertaken for the purpose of concealing certain attributes of the proceeds. ———

Rather than grappling with – or even acknowledging – that legislative choice,[5] the Government instead focuses on a handful of individual comments that, the Government argues, show Congress really wanted to define money laundering as secreting money out of the country. But the relevant question is not how many members of Congress would have preferred one reading or the other. Rather, the inquiry turns on what Congress as a whole ultimately *did*. The legislative background shows that the Government wanted Congress to define "money laundering" to include any and all international shipment of unlawful funds. *See* Petr. Br. 29-31. And Congress as a whole chose to adopt a different proposal.

Indeed, the Government itself notes that, as compared to initial proposals, the enacted version of § 1956(a)(2) "took 'a qualitatively different approach' to 'the *nature* of the transactions that it covers' by 'applying its coverage to those transactions that can be said to constitute the *core* of money laundering – transactions designed to conceal or disguise the nature, location, source, ownership, or control of criminal proceeds.'" U.S. Br. 32 (emphasis added) (quoting S. Rep. No. 99-433 (1986)). The Government's effort to explain the difference between the proposed broad version and the enacted narrow version is nothing but a dodge: the change makes sense, the Government urges, because under the more restrictive statute adopted, a conviction will not lie when "the circumstances surrounding a transaction or

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[5] Notably absent from the hypothetical statutes conjured by the Government (U.S. Br. 30-31) are the specific alternatives Congress had before it when it enacted § 1956.

transportation do not demonstrate it was designed to conceal or disguise *in the relevant sense*." U.S. Br. 33 (emphasis added). As shown above, however, the Government ultimately has no coherent theory to explain what concealment "in the relevant sense" means. And under the theory of "concealment" the Government does advance, every international transportation of illicit funds is, in practice, a prohibited concealment – *precisely* the statute Congress chose *not* to adopt.[6]

2. Even the snippets of legislative debate cherry-picked by the Government do not support its view of the statute. For example, the Government asserts that the Senate Report accompanying § 1956's final version "defined the physical transportation of cash into and out of the United States as 'laundering' activities in and of themselves." U.S. Br. 29. In making that assertion, the Government relies on a statement in the Senate Report that § 1956(a)(2) "'covers situations in which money *is being laundered by* transferring it into the United States as well as those in which money *is being laundered by* transferring it out of the United States.'" *Id.* (quoting S. Rep. No. 99-433, at 11). Even read in total isolation, that sentence is, at best, equivocal: it might mean that any international shipment of unlawful funds is money laundering and covered by § 1956(a)(2); but it might mean that the statute covers international

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[6] The Government cites a string of cases for the proposition that not every transaction or transportation will trigger a finding of concealment under its view of the statute. U.S. Br. 33 n.12. Tellingly, none of those cases involved the transportation prong.

shipments of dirty money when part of a "launder[ing]" scheme.

Read in context, the sentence plainly means the latter. Immediately following that excerpt, the Senate Report explains that § 1956(a)(2)'s final text "avoid[ed] . . . pitfalls of" the administration's proposal. S. Rep. No. 99-433, at 11. Specifically, whereas the administration's bill "would have been triggered by the mere receipt of property," the legislation Congress adopted "requires that the accused defendant engage in an act of transporting . . . *and* either intend to facilitate a crime," as required under the promotion prong, "or know that the transaction was designed to conceal a crime," as required under the concealment prong. *Id.* (emphasis added). The Senate Report thus makes clear that physical transportation of cash out of the United States by itself is *not* money laundering; the Government must *also* prove the defendant knew the transportation was for a specifically enumerated purpose.

The Government fares no better in relying on its own testimony – in support of its failed proposal – that "criminal organizations . . . wash their own illegally generated money by such relatively crude methods as one of their members' smuggling a suitcase full of currency out of the country for deposit in an offshore bank." *See* U.S. Br. 27-28 (quoting *Money Laundering Legislation: Hearing on S. 572, S. 1335, and S. 1385 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 57 (1985) (statement of Stephen S. Trott, Assistant Attorney General, Criminal Division)). Even if smuggling unlawful money internationally *"for deposit in an offshore bank"* contravenes § 1956(a)(2), the Government's

position appears to be – and, in fact, must be if petitioner's conviction is to stand – that the international transportation of money *itself* is money laundering, perhaps so long as the money is (as it invariably will be) physically hidden during transit. Not even its own congressional testimony supports this view.

3. Finally, if, as the Government asserts, § 1956 is actually intended to provide law enforcement a "tool[]" for preventing criminals from hiding unlawful proceeds from authorities, then it is oddly ill-suited to the task. *See* U.S. Br. 30 ("Congress's concern was that . . . law enforcement needed better tools to find and seize illegal proceeds *no matter how* criminals sought to conceal or disguise them."); *id.* at 31 (international transportation "frustrate[s] the ability of law enforcement to find the money").[7] Although secreting money out of the country is one way in which criminals might try to hide it from domestic law enforcement, it is neither the only way nor the most obvious. A criminal can "conceal" unlawful funds from law enforcement in any number

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[7] The Government claims this purported purpose is "reinforced by one of the stated purposes of Section 1956(a)(2) – 'to obtain international cooperation to halt the flow of drug money.'" U.S. Br. 31 (quoting S. Rep. No. 99-433, at 11). While international cooperation has been highlighted as necessary to combat money laundering, *see* 2007 Nat'l Money Laundering Strategy ("2007 Strategy"), at 11-12, *available at* http://www.ice.gov/doclib/pi/ financial/2007nmls.pdf, it is necessary *precisely because* authorities need to know what will happen (or what did happen) after the proceeds have crossed the border. If physical concealment at the border were sufficient, more and better-trained border patrol agents could do the job without international assistance.

of less intricate ways, such as hiding it inside a mattress or burying it in his backyard. Yet none of that conduct would come within § 1956(a) because it does not involve a transaction or international transportation. If Congress wanted to define the hiding of unlawful funds as money laundering, it would have simply done so, and not bothered with the need for a transaction or transportation.

The only legislative purpose that can be reconciled with § 1956(a)'s *text* is a desire to focus on the *cleansing* of dirty money – either through domestic transactions designed to conceal, or by moving the money internationally so that it may be more easily laundered overseas. And the only coherent way to read § 1956(a)(2) is as prohibiting the international shipment of cash undertaken for the purpose of concealing one of the listed attributes, which are the attributes that betray unlawful proceeds' illegitimacy.

D. The Bulk Cash Smuggling Statute Shows That Congress Did Not Construe The Money Laundering Statute As Broadly As The Government Does

The Government disputes the relevance of the BCS statute here by misconstruing both petitioner's argument and the statute itself. Petitioner does not argue that because he might have been charged under the BCS statute he should not have been charged under the money laundering statute, nor does he argue that the statutes impermissibly overlap. U.S. Br. 36. Instead, the BCS statute is relevant here because it demonstrates that Congress perceived a *gap* in the money laundering scheme for the act of smuggling illicit proceeds across the bor-

der, and enacted the BCS statute to fill that gap. Petr. Br. 33-35.

Congress's understanding of the limits of § 1956(a)(2) is made clear in the legislative findings written into the BCS statute itself, which describe the statute as a necessary "deterrent to the laundering of criminal proceeds," particularly "in cases where the only criminal violation under current law is a reporting offense." Pub. L. No. 107-56, § 371(a)(6), 115 Stat. 272, 336 (2001). As then-Assistant Attorney General Michael Chertoff elaborated:

> [H]undreds of millions of dollars in U.S. currency representing drug proceeds, as well as proceeds of other criminal offenses, are transported out of the United States each year in shipments of bulk cash. *The only law enforcement weapon currently available to combat this activity is a requirement that shipments of more than $10,000 in cash be accompanied by a report to the United States Customs Service.*

Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before the H. Comm. on Financial Services, 107th Cong. (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division) (emphasis added); *see The Administration's National Money Laundering Strategy for 2001: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 107th Cong. (2001) (statement of Rep. LaFalce) ("Currently, the couriers of illicit cash are subject to only minimal jail sentences for failing to file currency reports.").

The Government claims the BCS statute is inapposite because it "does not purport to deal with cases where the government can show that the proceeds were illegal and the defendant knew that fact." U.S. Br. 11. The suggestion that the BCS statute was not intended to target illicit proceeds in general, and drug trafficking proceeds in particular, is incorrect. The legislative statements just cited show that Congress was concerned with illicit proceeds, and the statute's own legislative findings again make the point expressly. Those findings declare that the target of the statute is "drug dealers and other criminals," Pub. L. No. 107-56 § 371(a)(1), (2), and they continue:

> The arrest and prosecution of bulk cash smugglers are important parts of law enforcement's effort to *stop the laundering of criminal proceeds*, but the couriers who attempt to smuggle the cash out of the United States are typically low-level employees of large criminal organizations, and thus are easily replaced.

Id. (a)(5) (emphasis added). In short, the BCS statute was needed because Congress believed the "penalties for violations of the currency reporting requirements [were] insufficient to provide a deterrent to the laundering of *criminal proceeds*." *Id.* (a)(6) (emphasis added). *See also* 2007 Strategy at v ("Bulk cash smuggling is *most often associated with illegal narcotics*.") (emphasis added).

The foregoing also demonstrates the error in the Government's claim that petitioner's conduct here was more "culpable" than the conduct targeted by

the BCS statute because it involved "drug trafficking proceeds." U.S. Br. 37. As the legislative background of the BCS statute shows, the fact that petitioner's conduct involved drug trafficking proceeds means it was *exactly* the type of conduct targeted by the BCS statute.[8]

E. If Any Room For Doubt Remained, The Rule Of Lenity Compels A Narrow Construction Of The Statute

The Government's inability to produce a coherent and principled theory of what constitutes concealment "in the relevant sense" belies its contention that the Government's interpretation reflects the "plain" meaning of the statute. By contrast, petitioner's view fully reconciles the words, structure, context, and background of the statute. To that extent, petitioner agrees that the rule of lenity need not be applied. *See Castillo v. United States*, 530 U.S. 120, 131 (2000) (the rule of lenity applies only if ambiguity remains "after considering traditional interpretive factors"). But if, after employing all the ordinary tools of construction, there is any remaining doubt about the statute's meaning – and, in particular, if the Government has not shown its alternative construction to be *clearly superior* to petitioner's

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[8] The Government complains that it is "questionable" that it could have proven a BCS violation since petitioner was stopped short of the border. But the Government has charged – and convicted – defendants under similar circumstances. *See United States v. Gonzalez*, 2007 WL 1793571 (M.D. Ala. June 19, 2007) (charging defendant under § 5332 for attempting to smuggle over $100,000 to Mexico after being stopped far from the border in Montgomery, Alabama) (subsequent guilty plea available at 2007 WL 2468753 (M.D. Ala. July 2, 2007)).

reading – the rule of lenity compels adoption of petitioner's construction: "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (where "text, structure, and history fail to establish that the Government's position is unambiguously correct," rule of lenity is applied to "resolve the ambiguity in [defendant's] favor").[9]

The Government's suggestion that the rule has its "greatest force" when the broader reading might capture otherwise innocent conduct (U.S. Br. 39) is of no consequence. Even if the rule has *greater* force in that situation, no precedent has ever suggested that the rule *lacks* force when the underlying conduct might still be culpable in some other way. To

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[9] The Government submits that the rule of lenity applies only in cases of "grievous ambiguity." U.S. Br. 39 (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)). Its reliance on *Muscarello*'s restrictive language overlooks several of this Court's other recent formulations of the rule that require no more than ordinary ambiguity in order for the rule to apply. *See, e.g.*, *Scheidler*, 537 U.S. at 409 (rule applies whenever there are "two rational readings"); *Castillo*, 530 U.S. at 131 (rule applies when Court is "genuinely uncertain" about meaning); *James v. United States*, 127 S. Ct. 1586, 1603 (2007) (Scalia, J., dissenting) (rule applies when statute is capable of more than one reasonable construction); *Fischer v. United States*, 529 U.S. 667, 691 (2000) (Thomas, J., dissenting) ("[T]o the extent that there is any ambiguity in [a statutory term], we should resolve that ambiguity in favor of the defendant.").

the contrary, the rule applies even to the construction of criminal penalties, which by definition involve conduct that is not "innocent." *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).[10] Accordingly, even though transporting the proceeds of criminal activity abroad may be blameworthy conduct, any ambiguity in the statute enacted to criminalize that conduct must be resolved in favor of petitioner.

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[10] The policies underlying the rule explain why it applies to the construction of statutes implicating non-innocent conduct. First, the rule is based on the need to provide "fair warning . . . to the world" of what is criminalized. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). A "fair warning" must include not only notice that the conduct is wrongful, but also the extent of the penalties that may be imposed. *See Bifulco*, 447 U.S. at 387. Second, the rule of lenity assures that definition of crimes takes place in the legislature, not the judiciary. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971) ("This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." (quotation omitted)); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("the power of punishment is vested in the legislative, not in the judicial department"). Third, the rule serves to "minimize the risk of selective or arbitrary enforcement" by prosecutors. *United States v. Kozminski*, 487 U.S. 931, 952 (1988). That danger is present – even exacerbated – when the underlying conduct is non-innocent, because construing a statute broadly to encompass conduct already criminalized by another statute only enhances the opportunity for abuse.

II. BECAUSE THERE IS NO EVIDENCE THAT PETITIONER KNEW THAT THE PURPOSE OF HIS TRIP WAS TO CONCEAL LISTED ATTRIBUTES OF ILLICIT FUNDS, HIS CONVICTION MUST BE REVERSED

Unsurprisingly, the Government's purported test would permit petitioner's conviction to stand – just as it would permit a conviction for virtually *any* international transportation of illicit proceeds. Judged under the proper standard, however, petitioner's conviction must be reversed because there is no evidence – much less proof beyond a reasonable doubt – that he knew the purpose for which the money was being transported.

The court below affirmed petitioner's conviction based almost entirely on evidence concerning the method of transportation, rather than on any evidence establishing the purpose of the transportation. As the en banc dissent explained, "The government did not prove or even attempt to prove anything about what Cuellar planned to do with the money once he reached his destination; the prosecution showed only that he was concealing the money to transport it." Pet. App. 25a.

In response, the Government implicitly concedes that it has no evidence concerning the plans for the proceeds in Mexico. Instead the Government relies primarily on facts showing that petitioner intended to cross the Mexican border with the proceeds hidden in his vehicle. *See* U.S. Br. 43 (noting "petitioner's admitted destination of Mexico, [and] the elaborate measures taken to convert the rear portion of the Beetle into a secret cargo compartment").

Such evidence may prove that petitioner was attempting an international transportation with the proceeds, but it says nothing about the purpose of that transportation. That leaves only the evidence that petitioner knew little about the owner of the cash – except for his name, the most critical fact. Pet. App. 11a. That evidence, too, does nothing to establish that the trip to Mexico was designed to cleanse the funds of their criminal taint by concealing their location, ownership, source, or control. Indeed, the Government's *own expert witness* testified petitioner was a drug-smuggling courier, whose hidden money would be used to pay off a supplier in the drug-smuggling chain. Petr. Br. 45. A plan to pay off a supplier cannot be a plan to conceal money – unless a "design to conceal" means a design to do *literally anything*.

But that of course is exactly how the Government construes the phrase: "Whatever is done with the illegal proceeds in Mexico . . . they have been surreptitiously moved to a location where United States law enforcement authorities are impaired from detecting and intercepting them." U.S. Br. 46. There could be no clearer statement of the Government's view that *all* international transportations of illicit funds are criminalized by § 1956(a)(2). And there thus could be no clearer statement of why the Government's construction of the statute cannot be correct. Petitioner's conviction must be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below, and remand for the district court to enter a judgment of acquittal.

Respectfully submitted,

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February 15, 2008